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89-1899

Supreme Court, U.S.
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NO. _____

SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM 1989

NEIL RYPKEMA D/B/A
LAUREL HILL TRUCKING COMPANY
DEFENDANT/PETITIONER

V.

DEIDRE CALURI
PLAINTIFF/RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE

PETITION FOR WRIT OF CERTIORARI

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I. QUESTION PRESENTED

WHETHER NEIL RYPKEMA HAS SUFFICIENT MINIMUM CONTACTS WITH THE STATE OF MAINE TO PERMIT A MAINE COURT TO ASSERT PERSONAL JURISDICTION CONSISTENT WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

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IV. REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS

Caluri v. Rypkema, 570 A.2d 830 (Me. 1990).

Caluri v. Rypkema, No. CV-88-212 (Me. Super. Ct., Pen. Cty., Aug. 14, 1989).

V. STATEMENT OF JURISDICTIONAL GROUNDS

(i) Date of Judgment: February 27, 1990

(ii) N/A

(iii) N/A

(iv) Statutory provision supporting jurisdiction:
28 U.S.C. § 1257(a) (1988).

There is a final judgment reviewable by this Court. An assertion of personal jurisdiction with no further review of that issue possible in state court may be considered by the Supreme Court before a decision on the merits. See Rosenblatt v. American Cyanamid Co., 86 S.Ct. 1 (1965). In Rosenblatt, Justice Golberg concluded that a final state court decision finding personal jurisdiction was a final judgment for purposes of review. Id.

A motion to stay the underlying proceedings while this appeal is pending has been filed in Penobscot County Superior Court.

VI. CONSTITUTIONAL PROVISIONS AND STATUTES

(i) Amendment XIV to the United States Constitution

§ 1. Citizenship rights not to be abridged by states.

Section 1. ... nor shall any state deprive any person of life, liberty, or property, without due process of the law; ...

(ii) 14 M.R.S.A. § 704-A (1980) (See Appendix 13-14)

VII. STATEMENT OF THE CASE

The plaintiff, Deidre Caluri, brought suit in Maine Superior Court against the defendant, Neil Rypkema d/b/a/ Laurel Hill Trucking Company, by complaint dated May 16, 1988. Service of process was made on Neil Rypkema in Secaucus, New Jersey on or about June 10, 1988.

On July 14, 1988, Neil Rypkema filed a motion to dismiss pursuant to M.R. Civ. P. 12(b)(2) because the court lacks personal jurisdiction over him. In his supporting memorandum, Mr. Rypkema cited a federal decision to support his argument that his due process rights under the Fourteenth Amendment to the United States Constitution would be violated if the court asserted personal jurisdiction. Mr. Rypkema also maintained that the corporation, Laurel Hill Trucking Company, was the proper party, not himself individually.

On August 14, 1989, the Superior Court, after a nontestimonial hearing, granted the motion to dismiss. The presiding justice concluded that Neil Rypkema did not have sufficient contacts with the state to require him to defend this action in Maine. Order, Appendix at 5-12. The court cited two federal decisions in support of its conclusion. Order, Appendix at 9-11, citing Whittaker Corp. v. United Aircraft Corp., 482 F.2d 1079 (1st Cir. 1973); Cives Corp. v. American Electric Power Co., Inc., 550 F. Supp. 1155 (D. Me. 1982).

The plaintiff-respondent filed a timely notice of appeal. Both parties briefed the issue of whether the court lacked personal jurisdiction consistent witht he due process clause of the Fourteenth Amendment to the United States Constitution.

On February 27, 1990, the Maine Supreme Judicial Court vacated the order of the Superior Court and remanded for trial. The Law Court reasoned that because the defendant should have reasonably anticipated litigation in Maine, the assertion of jurisdiction comports with the due process clause of the United States Constitution. Caluri v. Rypkema, 570 A.2d 830 (Me. 1990).

The plaintiff, a Maine resident, alleged in her complaint that she entered into a contract with the defendant, Neil Rypkema, a New Jersey resident. She alleges that the defendant breached the contract. See Complaint, Appendix at 15-18.

In February, 1985, the plaintiff contacted Mr. Rypkema in New Jersey by telephone to discuss the possibility of becoming the Maine representative for Laurel Hill Trucking Company. Affidavit of Deidre Caluri, Appendix at 19-21.[1] The plaintiff informed Mr. Rypkema that she would contact various Maine businesses to determine if they needed

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1 Mr. Rypkema has been sued as an individual. The company has not been named as a direct defendant and has not been served. Accordingly, the list of companies and subsidiaries required under Supreme Court Rule 29.1 has not been provided.

trucking services. Id. If she was successful in obtaining contracts for Laurel Hill Trucking Company, her fee would be based on a percentage of the hauling contract. Id.

The named defendant, Neil Rypkema, is the president of Laurel Hill Trucking Company of Secaucus, New Jersey. Affidavit of Neil Rypkema, Appendix at 22-23. Laurel Hill Trucking Company is a corporation organized under the laws of New Jersey. Mr. Rypkema never personally entered into a contract with the plaintiff and has never personally done business in the State of Maine. Id. He does not own, use or possess any real estate in Maine. Id. Mr. Rypkema has never personally committed a tortious act in Maine, nor has he caused a tortious act to be done in Maine. Id. He has not personally contracted to insure any person, property or risk in Maine and has not contracted to supply services or things in Maine. Id.

The only contract allegedly arranged by the plaintiff involved Ames Department Stores, Inc. which has its regional headquarters in Rocky Hill, Connecticut. See Affidavit of Deidre Caluri, Appendix at 19-21. On March 8, 1985, an Ames representative asked the plaintiff if trucks were available in Ohio, Pennsylvania and Massachusetts. The plaintiff replied that there were trucks available in those states and arranged a meeting at Ames' regional headquarters between Mr. Rypkema, a representative of Ames, and herself. Id. at 19. The plaintiff alleges that Laurel Hill Trucking Company began hauling for Ames on May 28, 1985. Id. The plaintiff does not allege that Mr. Rypkema or Laurel Hill Trucking Company hauled any loads into the State of Maine for Ames or for any other person or corporation.

With the exception of the meeting in Connecticut, all direct discussions between the parties were conducted by telephone. According to the Plaintiff's Affidavit, only one telephone call originated from Laurel Hill Trucking Company. Affidavit of Deidre Caluri, ¶ 15, Appendix at 19-21. From April, 1985 to December, 1986, the plaintiff received commissions from the defendant on the Ames' account. Complaint, Appendix at 16.

VIII. ARGUMENT

In Caluri v. Rypkema, 570 A.2d 830 (Me. 1990), the Maine Supreme Judicial Court erred in its application of a longstanding series of United States Supreme Court decisions that delineate when personal jurisdiction may be asserted consistent with the due process clause of the Fourteenth Amendment to the United States Constitution. The Supreme Court has consistently held that the due process clause of the Fourteenth Amendment precludes a state court from exercising personal jurisdiction over a defendant under circumstances that offend "traditional notions of fair play and substantial justice." Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County, 480 U.S. 102 (1987); International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940). To satisfy the "traditional notions of fair play and substantial justice," a nonresident defendant must have "minimum contacts" with the forum state before personal jurisdiction may be asserted. Asahi Metal Industry, 480 U.S. at 108, 109; International Shoe Co., 326 U.S. at 316.

The necessary minimum contacts must be based on "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985). As the Court further stated, "[j]urisdiction is proper . . . where the contacts proximately result from actions by the defendant himself that create a 'substantial connection' with the forum state." Id. quoting McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957). In applying this principle, the Supreme Court has ruled that the minimum contacts must be based on the affirmative actions of the defendant; unilateral actions by the plaintiff are not sufficient. Asahi Metal Industry, 480 U.S. at 109; World-Wide Volkswagen Corp. v. Woodsen, 444 U.S. 286 (1980). See also Nicholas v. Buchanan, 806 F.2d 305, 307 (1st Cir. 1986), cert. denied, 481 U.S. 1071 (1987).

Lower federal courts applying these decisions have held that an individual's contract with an out-of-state party cannot alone establish sufficient minimum contacts. Nicholas v. Buchanan, 806 F.2d 305, 307 (1st Cir. 1986), cert. denied, 481 U.S. 1071 (1987); Cives Corp. v. American Electric Power Co., Inc., 550 F. Supp. 1155 (D. Me. 1982). The courts reasoned that the plaintiffs' unilateral performance of the contract within the forum state was insufficient to support the exercise

of personal jurisdiction. Nicholas, 806 F.2d at 307; Cives Corp., 550 F.Supp. at 1158. The use of interstate channels of communication is also insufficient to satisfy due process requirements. Nicholas, 806 F.2d at 307.

Without expressly saying so, the Maine Supreme Judicial Court adopted a "foreseeability" test to determine if personal jurisdiction may be asserted in the present case. In Caluri v. Rypkema, 570 A.2d 830 (Me. 1990), the Law Court determined jurisdiction was proper because the defendant "should reasonably have anticipated litigation in Maine." Caluri v. Rypkema, 570 A.2d at 832. However, the United States Supreme Court has rejected "foreseeability" as a benchmark to determine personal jurisdiction. World-Wide Volkswagen Corp. v. Woodsen, 444 U.S. 286, 297 (1980). In rejecting the foreseeability test, the Supreme Court emphasized that "the mere unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state." World-Wide Volkswagen Corp., 444 U.S. at 294, quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958).

In this case, the contacts, if any, between the State of Maine and Neil Rypkema were the unilateral efforts of the plaintiff. Neil Rypkema is a resident of New Jersey who has never personally done business in Maine. Any contacts were between the plaintiff and Laurel Hill Trucking Company, not Mr. Rypkema individually. Mr. Rypkema states in his affidavit that he has not engaged in any of the acts enumerated in the Maine Long-Arm Statute, 14 M.R.S.A. § 704-A (1980). Thus, Mr. Rypkema has never personally availed himself of the benefits and protections of the State of Maine.

The plaintiff has alleged that she performed various acts in the State of Maine on behalf of Laurel Hill Trucking Company. However, these unilateral acts cannot support jurisdiction. See, e.g., Asahi Metal Industry Co., Ltd., 440 U.S. at 109 (1987). The plaintiff states in her affidavit that she made the first contact with Mr. Rypkema by calling him in New Jersey. The only business she allegedly generated involved shipping services performed in Pennsylvania, Ohio and Massachusetts. The only personal meeting between the parties occurred in Connecticut. Although a manager of Laurel Hill Trucking Company called the plaintiff on one occasion and her initial commissions were paid in correspondence sent through the United States mail, this use of interstate means of communication is insufficient to support jurisdiction. Nicholas, 806 F.2d at 307; Cives, 550 F.Supp. at 1158.

The plaintiff has failed to establish that Neil Rypkema has "minimum contacts" with the State of Maine. Thus, the courts of the State of Maine are precluded from asserting personal jurisdiction.

The due process clause protection against an unwarranted assertion of personal jurisdiction is a significant aspect of the Fourteenth Amendment to the United States Constitution. The United States Supreme Court has issued consistent precedent applying the "minimum contacts" analysis in determining whether personal jurisdiction exists. The decision of the Maine Supreme Judicial Court departs from that tradition. Accordingly, the defendant-petitioner, Neil Rypkema, respectfully requests the United States Supreme Court to grant certiorari in this case to resolve this ongoing and important issue of constitutional law.

Respectfully submitted this 23rd day of May, 1990.

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IX. APPENDIX

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Deidre CALURI

v.

Neil RYPKEMA d/b/a/ Laurel Hill Trucking Company.

Supreme Judicial Court of Maine.

Submitted on Briefs Jan. 30, 1990.
Decided Feb. 27, 1990.

Representative of trucking company brought suit against company for breach of contract. The Superior Court, Penobscot County, Beaulieu, J., dismissed complaint for lack of personal jurisdiction, and representative appealed. The Supreme Judicial Court, Wathen, J., held that jurisdiction over trucking company comported with due process clause.

Vacated and remanded.

Perry O'Brian, Vandermeulen, Goldman, Allen & O'Brian, Bangor, for plaintiff.

Brett D. Baber, Phillip D. Buckley, Rudman & Winchell, Bangor, for defendant.

Before WATHEN, GLASSMAN, CLIFFORD, HORNBY and COLLINS, JJ.

WATHEN, Justice.

Plaintiff Deidre Caluri appeals from an order of the Superior Court (Penobscot County, *Beaulieu, J.*) dismissing her complaint pursuant to M.R.Civ.P. 12(b)(2) for lack of personal jurisdiction over defendant, Neil Rypkema, d/b/a/ Laurel Hill Trucking Company. On appeal, plaintiff argues that by his conduct defendant should reasonably have anticipated litigation in Maine and that therefore jurisdiction over defendant comports with the due process clause of the United States Constitution . We agree with plaintiff's contention and vacate the Superior Court's order.

By her complaint and affidavit, plaintiff has alleged the following facts: Plaintiff is a resident of Stetson, Maine. In February, 1985, she contacted defendant by phone and discussed with him the possibility of becoming the Maine representative for Laurel Hill Trucking Company. Plaintiff was to contact various businesses in Maine for the purpose of securing contracts for defendant. Her commission was to be based on a percentage of the total amount hauled under each contract.

On March 4, plaintiff contacted the Ames Department Store in Newport, Maine. She was referred to George Bolduc, Assistant Traffic Manager at Ames' regional headquarters in Rocky Hill, Connecticut. At Bolduc's request, and with defendant's approval, plaintiff mailed a letter to Bolduc setting forth information on rates and insurance. On April 23, both plaintiff, from Maine, and defendant, from New Jersey, travelled to Rocky Hill and met with Bolduc. On May 28, defendant began hauling for Ames Department Stores. None of the hauling took place in Maine.

From April, 1985, to December, 1986, plaintiff received periodic commissions on the Ames account. In August, 1985, defendant telephoned plaintiff regarding the Ames account because business was unusually slow. Plaintiff contacted Bolduc and soon after business increased dramatically. In addition to the Ames account, plaintiff contacted numerous other businesses in Maine in the hope of securing other contracts but was ultimately unsuccessful.

Defendant made no payments after December 31, 1986. Plaintiff's complaint states a cause of action for breach of contract. After a nontestimonial hearing, the Superior Court granted defendant's motion to dismiss for lack of personal jurisdiction. Plaintiff now appeals.

[1] The jurisdictional reach of Maine's Long-Arm statute is coextensive with the due process clause of the United States Constitution. *See* 14 M.R.S.A. § 704-A (1980).[1] In order to satisfy the requirements of due process, the Court must affirmatively answer three questions:

> (1) does the forum state have a legitimate interest in the subject matter of the action; (2) should the defendant by his conduct reasonably have anticipated litigation in the forum state; and (3) would the exercise of jurisdiction comport with "traditional notions of fair play and substantial justice"?

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1. § 704-A provides in relevant part:
   2. *Causes of action.* Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated in this section . . .
   I. Maintain any other relation to the State or to persons or property which affords a basis for the exercise of jurisdiction by the courts of this State consistent with the Constitution of the United States.

Harriman v. Demoulas Supermarkets, Inc., 518 A.2d 1035, 1036(Me.1986). *Foreside Common Development Corp. v. Bleisch*, 463 A.2d 767, 769 (Me.1983). Plaintiff bears the burden of establishing that jurisdiction is proper. *Kowalski v. Doherty, Wallace, Pillsbury & Murphy*, 787 F.2d 7, 8 (1st Cir.1986).[2] Such showing "must be based on specific facts set forth in the record," and the record is to be "construed in plaintiff's favor." *Id.* at 8-9.[3]

Plaintiff argues that the motion justice erred by ruling that she failed to satisfy the second prong of the test, namely, that by his conduct defendant should "reasonably have anticipated litigation in [Maine]." *Harriman*, 518 A.2d at 1036.[4] Specifically, plaintiff contends that the court's reliance on *Cives Corp. v. American Electric Power Co., Inc.*, 550 F.Supp. 1155 (D.Me. 1982), and *Whittaker Corp. v. United Aircraft Corp.*, 482 F.2d 1079 (1st Cir. 1973), was misplaced. In plaintiff's view, a recent United States Supreme Court decision, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985), supports Maine's jurisdiction over defendant in this case.

Our analysis in *Harriman* incorporates *Burger King* and the other governing opinions of the United States Supreme Court. In *Harriman*, we held that a Massachusetts supermarket chain, Demoulas Supermarkets, Inc., could be sued in Maine for the personal injuries to an employee of F.R. LePage, Inc., a Maine bakery with which it did business, "because

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2. This is true, however, only for the first two prongs of the test. Once plaintiff has established that Maine has a legitimate interest in the controversy and that the requisite minimum contracts [sic] exist, the burden then shifts to defendant to show that jurisdiction does *not* comport with "traditional notions of fair play and substantial justice." *Harriman*, 518 A.2d at 1039, quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477, 105 S.Ct. 2174, 2184, 85 L.Ed.2d 528 (1985).

3. While we have never ruled on this issue, the United States Court of Appeals for the First Circuit has held that "[w]here there has been no evidentiary hearing and the court proceeds upon written submissions, [the] plaintiff 'need only make a prima facie showing that jurisdiction exists. . . .'" *Kowalski*, 787 F.2d at 8 (citations omitted). Accordingly, "[p]laintiff's written allegations of jurisdictional facts [should be] construed in [her] favor." *Id.* at 9.

4. Defendant concedes that the Superior Court correctly ruled that plaintiff sustained her burden on the first prong of the test.

it purposefully and continuously directed both purchasing and sales activities at Maine businesses and residents." *Harriman*, 518 A.2d at 1037. With respect to its purchasing activities, we focused on a twelve-year oral agreement that resulted in LePage, along with another Maine bakery, fulfilling 40% of Demoulas' baked good requirements annually, as well as the control Demoulas gained over production by directing LePage to attach its private labels on a portion of the baked good that Demoulas ordered. *Id.* at 1037-38. With respect to its sales activities, we noted that Demoulas sought to and did infiltrate the sourthern Maine market respecting its New Hampshire stores by advertising in newspapers and on radio. *Id.* at 1038.

[2] In analyzing whether Demoulas should reasonably have anticipated litigation in Maine, our opinion in *Harriman* relies on *Burger King*, stating that due process is satisfied when a defendant " 'purposefully directs his activities at residents of a forum' . . . by 'creating continuing obligations between himself and residents' of the forum. . . . " *Harriman*, 518 A.2d at 1037, quoting *Burger King*, 471 U.S. at 473-75, 105 S.Ct. at 2182-84. Applying this standard to the facts of this case, we conclude that plaintiff has established the requisite minimum contacts to support personal jurisdiction over defendant. First, defendant's obligations to plaintiff respecting the Ames account were of a continuous nature. Second, plaintiff has made a prima facie showing that a general agency relationship existed between herself and defendant whereby defendant attempted to infiltrate the Maine market for trucking services.[5] *See, e.g.*,

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5. In *Burger King*, the Court spoke at some length respecting the extent to which a contract can constitute a "contact" for purposes of due process analysis:

> If the question is whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot. The Court long ago rejected the notion that personal jurisdiction might turn on 'mechanical' tests, or on 'conceptualistic . . . theories of the place of contracting or of performance.' Instead, we have emphasized the need for a 'highly realistic' approach that recognizes that a 'contract' is 'ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction.' It is these factors-prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing-that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.

Burger King, 471 U.S. at 478-79, 105 S.Ct. at 2185-86 (emphasis in original) (citations omitted).

Libby v. Concord General Mut. Ins. Co., 452 A.2d 979, 981 (Me.1982) ("Agency is the fiduciary relationship 'which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to this control, and consent by the other so to act.'"); *Restatement (Second) of Agency §§* 1, 3 & 7 (1958). Finally, as in *Harriman*, defendant exercised control over plaintiff's performance. This was demonstrated by defendant's authorization of plaintiff's letter to Bolduc regarding rates and insurance, as well as defendant's phone call when the Ames account slowed.

The third prong of the test is whether subjecting defendant to the jurisdiction of Maine courts comports with "traditional notions of fair play and substantial justice." In deciding this question in *Harriman*, we again relied on *Burger King:*

> [W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisidction unreasonable.

Harriman, 518 A.2d at 1039, quoting *Burger King*, 471 U.S. at 477, 105 S.Ct. at 2184. Defendant's affidavit reveals no attempt to demonstrate that litigation in Maine would be " 'so gravely difficult and inconvenient'" that he would be at a "'severe disadvantage in comparison to [plaintiff].' " *Burger King*, 471 U.S. at 477, 105 S.Ct. at 2184 (citations omitted). Moreover, as demonstrated above, the nature and purpose of defendant's contacts were not so " 'random, fortuitous, or attenuated' "that jurisdiction over defendant is unreasonable. *Harriman*, 518 A.2d at 1038. Finally, while the extent of defendant's contacts with Maine is small, "[l]ess extensive activity is required where the cause of action arises out of or in connection with the defendant's forum-related activity." *Id.* Because plaintiff's suit is on the contract, such is the case here.

The entry is:

Order dismissing plaintiff's complaint vacated. Remanded for further proceedings consistent with the opinion herein.

All concurring.

STATE OF MAINE
PENOBSCOT, ss:

SUPERIOR COURT
Civil Action
Docket No. CV-88-212

DEIDRE CALURI

Plaintiff

v.

ORDER

NEIL RYPKEMA d/b/a LAUREL HILL TRUCKING COMPANY

Defendant

This breach of contract action is before the Superior Court on defendant's motion to dismiss plaintiff's complaint pursuant to Rule 12(b)(2) for lack of personal jurisdiction over the defendant.

FACTUAL BACKGROUND

By way of complaint and sworn affidavit plaintiff asserts the following facts: Plaintiff is a resident of Stetson, Maine; defendant is operating under the name of Laurel Hill Trucking Co., whose principal place of business is in Secaucus, New Jersey. In April, 1985, plaintiff allegedly entered into a contract with the defendant under which plaintiff became the Maine representative of Laurel Hill Trucking Co. Plaintiff asserts that this cause of action is brought against defendant in his individual capacity.

Pursuant to the parties' contract, plaintiff asserts she secured for the defendant an account with Ames Department Stores, Inc., having its regional headquarters in Rocky Hill, Connecticut. From April, 1985 to December, 1986, plaintiff claims to have received periodic commissions from defendant on the Ames account as compensation to her for obtaining the account for defendant. Under the parties' contract, defendant allegedly agreed to pick up merchandise at various warehouses and bring such merchandise by truck to Ames Department warehouses throughout the United States.

With respect to the disputed contract, plaintiff does not claim to have engaged in negotiations with the defendant in person within the State of Maine. Plaintiff asserts that negotiations beginning in February, 1985 were conducted by telephone or letter with the defendant who was

then in New Jersey. Plaintiff further alleges that on April 23, 1985 she traveled to Rocky Hill, Connecticut where she met with the defendant and Ames' Assistant Traffic Manager. On May 28, 1985, following the parties' meeting, defendant allegedly began hauling for Ames Department Stores. Despite efforts by the plaintiff to secure contracts for the defendant in the State of Maine, plaintiff does not allege that defendant ever provided trucking services for any Maine residents.

Defendant has responded to plaintiff's assertions with an affidavit of its President, Cornelius S. Rypkema. Mr. Rypkema claims, among other things, that defendant has never contracted to supply services within the State of Maine, has never personally entered into a contract with plaintiff and has never personally done business in Maine.

DISCUSSION

Our analysis begins with Maine's "Long Arm" statute, 14 M.R.S.A. § 704-A[1] As stated in its declaration of purpose, the statute was drafted "to insure maximum protection to citizens of this state." 14 M.R.S.A. § 704-A. Accordingly, the Maine Law Court has interpreted the statute so as to extend jurisdiction "over nonresident defendants to the fullest extent permitted by the Due Process clause of the Fourteenth Amendment." Tyson v. Whitaker & Son, Inc., 407 A.2d 1, 3 (Me. 1979). In this case, plaintiff bears the burden of showing that based upon specific facts set forth in the record, personal jurisdiction over the defendant is proper. Aerial Survey & Photo, Inc. v. E. Coyote Enterprises, Inc., No. CV-89-27 (Me. Super. Ct., Som. Cty., May 30, 1989).

In Tyson v. Whitaker & Son, Inc., supra, 407 A.2d at 3, the Law Court recognized that the jurisdictional limits of Maine's long arm statute are coextensive with the jurisdictional requirements provided by the due process clause of the federal Constitution. The Tyson Court outlined a three-pronged test for determining whether due process permits the exercise of personal jurisdiction over a nonresident defendant. Personal jruisdiction is properly conferred if: (1) the forum state has a legitimate interest in the subject matter of the action; (2) the defendant exhibited

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1. Under Maine's long arm statute, personal jurisdiction over a nonresident defendant is proper where such person:

   Maintain[s] any other relation to the State or to persons or property which affords a basis for the exercise of jurisdiction by the courts of this State consistent with the Constitution of the United States.

conduct such that he should reasonably have anticipated being hailed into court in Maine; and (3) the exercise of jurisdiction does not violate "traditional notions of fair play and substantial justice." Foreside Common Develop. Corp. v. Bleisch, 463 A.2d 767, 769 (Me. 1983) (quoting, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).[sic]

The issue before this court is whether, (1) defendant's 's acceptance of plaintiff's services performed in Maine; (2) defendant's performance of trucking services for Ames outside of Maine; and (3) plaintiff's periodic receipt of commissions from defendant on the Ames account sufficiently exhibit conduct out of which defendant should reasonably have expected being hailed into court in Maine. Only if we find both a legitimate governmental interest and such reasonable expectation need we reach the third prong of the Tyson test.

Maine has a legitimate interest in providing a forum in which its citizens, engaged in business activities within this state, may effectively seek redress against nonresident citizens for a breach of contract. Therefore, plaintiff has met the first prong requirement of the Tyson test.

The second stage determination, however, is fatal to plaintiff's case. The Supreme Court has made it clear that the nonresident defendant who has "purposefully avail[ed] itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws," may properly be sued there. Hanson v. Deuckla, 357 U.S. 235, 253 (1958).[sic] In Tyson, the Law Court announced that "[t]he rationale underlying the 'purposefully availing' requirement ... appears to be that the defendant have at least fair notice or a reasonable expectation that he may be subject to suit in the foreign forum." Tyson, 407 A.2d at 5.

In Cives Corp. v. American Electric Power Co., Inc., 550 F. Supp. 1155, 1156 (D. Me. 1982), plaintiff Cives Corp. brought a breach of contract action against defendant power company. Plaintiff Cives, from its Auburn, Maine office, had solicited electrical work to be performed by plaintiff for defendant, outside of Maine. Id. Throughout the parties' negotiations and during the course of their performance no representative of defendant ever visited plaintiff in Maine. Id. All of the parties' contract negotiations were either written or telephone communications between plaintiff in Maine and defendant in New York. Id. During the course of their negotiations, however, plaintiff's personnel in Maine spent approximately 700 man hours preparing a final bid for the project. Id.

Pursuant to the parties' contract, plaintiff installed electrical equipment for defendant at a plant being built outside of Maine. Id. at 1157. Defendant made all monthly payments to plaintiff in Maine from defendant's Roanoke, Virginia office. Id. Plaintiff began the project sometime after the creation of the parties' contract in March, 1979, and finished in July, 1980.

The Cives court held that because the contacts between the defendant and the State of Maine were so minimal it would be unreasonable for the court to exercise personal jurisdiction over the defendant. Id. at 1158. The court noted that none of the defendants had an office in Maine; none of the defendants was licensed to do nor did business in Maine; no employee of the defendant visited Maine in connection with the parties' contract; and the only communications between defendant and plaintiff in Maine were by mail or telephone. Id. Additionally, the court noted that although plaintiff had spent a substantial amount of time in Maine preparing its contract bid for defendant (700 man hours), "plaintiff's unilateral performance within the forum state [was] insufficient to support the exercise of personal jurisdiction over [a] nonresident defendant[ ]." Id.

Similarly, in Whittaker Corporation v. United Aircraft Corporation, 482 F.2d 1079, 1085 (1973), the Massachusetts long arm statute did not permit the exercise of personal jurisdiction over foreign corporations where their primary contact with plaintiff in Massachusetts was plaintiff's performance of their contracts within the Commonwealth. The Whittaker court noted that although the creation of a manufacturing agreement with a forum state resident has been held to support long arm jurisdiction, "this result has been severely criticized as rendering all purchasers subject to long arm jurisdiction." Id.

Applying these principles to the case at bar, defendant's contacts with the plaintiff cannot support the exercise of personal jurisdiction over it within the State of Maine. According to the record, the only direct contacts between the defendant and plaintiff were those made when plaintiff and defendant met in Connecticut to negotiate the Ames contract. Any other written or telephone communications which the plaintiff and defendant may have had were from their respective offices in Maine and New Jersey. Defendant does not have an office in Maine; defendant is not licensed to do nor has it previously done business in Maine; and no officer or employee of defendant visited Maine in connection with the disputed contract.

As in the Whittaker case, this is not a case where defendant actively supervised or closely monitored plaintiff's performance within the forum state. Id. First, plaintiff was responsible for soliciting defendant's performance under their alleged contract. Second, plaintiff asserts that on only one occasion, when business was apparently slow as to the Ames account, did defendant express concern about the status of this account. Plaintiff's allegations that she received periodic commissions from defendant on the Ames account from April, 1985, until December, 1986, would certainly evidence defendant's recognition of services rendered by the plaintiff in Maine. However, the payment of such commissions,without more, is an insufficient basis on which to predicate minimum contacts between the defendant and the State of Maine.

Based on the minimal contacts which defendant has had with plaintiff in the forum state, it does not appear that defendant had "at least fair notice or a reasonable expectation" he might be amenable to suit in Maine. Tyson v. Whitaker & Son, Inc., supra, 407 A.2d at 5. Furthermore, as in Cives, plaintiff's unilateral performance within the forum state will not alone establish contacts on which personal jurisdiction may properly be based. In sum, defendant's dealings in this state have been such that it would be unfair and would violate traditional notions of fair play and substantial justice to require defendant to defend the present action in Maine.

Wherefore, the entry is:

Defendant's motion to dismiss plaintiff's complaint for lack of personal jurisdiction is GRANTED.

DATED: August 14, 1989

Eugene W. Beaulieu
Justice, Superior Court

§ 704. Repealed. 1975, c. 770, § 79, eff. April 16, 1976

Historical Note

See, now, § 704-A of this title.

§ 704-A. Persons subject to jurisdiction

1. Declaration of purpose. It is declared, as a matter of legislative determination, that the public interest demands that the State provide its citizens with an effective means of redress against nonresident persons who, through certain significant minimal contacts with this State, incur obligations to citizens entitled to the state's protection. This legislative action is deemed necessary because of technological progress which has substantially increased the flow of commerce between the several states resulting in increased interaction between persons of this State and persons of other states.

This section, to insure maximum protection to citizens of this State, shall be applied so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the United States Constitution, 14th amendment. [sic]

2. Causes of action. Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated in this section, thereby submits such person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts:

A. The transaction of any business within this State;

B. Doing or causing a tortious act to be done, or causing the consequences of a tortious act to occur within this State;

C. The ownership, use or possession of any real estate situated in this State;

D. Contracting to insure any person, property or risk located within this State at the time of contracting;

E. Conception resulting in paternity within the meaning of Title 19, chapter 5, subchapter III[1];

F. Contracting to supply services or things within this State;

G. Maintaining a domicile in this State while subject to a marital or family relationship out of which arises a claim for divorce, alimony, separate maintenance, property settlement, child support or child custody; or the commission in this State of any act giving rise to such a claim; or

H. Acting as a director, manager, trustee or other officer of a corporation incorporated under the laws of, or having its principal place of business within, this State.

I. Maintain any other relation to the State or to persons or property which affords a basis for the exercise of jurisdiction by the courts of this State consistent with the Constitution of the United States.

3. Personal service. Service of process upon any person who is subject to the jurisdiction of the courts of this State, as provided in this section, may be made by personally serving the summons upon the defendant outside this State, with the same force and effect as though summons had been personally served within this State.

4. Jurisdiction based upon this section. Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

5. Other service not affected. Nothing contained in this section limits or affects the right to serve any process in any other manner now or hereafter provided by law.

STATE OF MAINE
PENOBSCOT, SS.

SUPERIOR COURT
CIVIL ACTION, DOCKET NO. _____

DEIDRE CALURI, of Stetson,
County of Penobscot, State of Maine

PLAINTIFF

vs.

NEIL RYPKEMA d/b/a Laurel Hill
Trucking Company, of Secaucus,
County of Hudson,
State of New Jersey

DEFENDANT

COMPLAINT

NOW COMES the Plaintiff, Deidre Caluri, by and through her undersigned attorney, and complains against the Defendant as follows:

COUNT I

(Breach of Contract)

1. Plaintiff , Deidre Caluri, is of Stetson, County of Penobscot, State of Maine.

2. Plaintiff is operating under the name of Laurel Hill Trucking Company, whose principal place of business is in Secausus, County of Hudson, State of New Jersey.

3. On or about April, 1985, Plaintiff and Defendant entered into a contract whereby Plaintiff became the Maine representative of Laurel Hill Trucking Company. As part of this contract, Plaintiff agreed to attempt to obtain accounts throughout the United States for the Defendant in which Defendant would provide trucking services to various companies.

4. Under the contract, Defendant agreed to pay the Plaintiff a commission which would vary depending upon the size of the account that plaintiff would secure for Defendant. The Commission rate ranged

from 3 to 5 percent of the gross value per load hauled by Laurel Hill Trucking Company.

5. Pursuant to the contract, Plaintiff secured for Defendant an account with Ames Department Stores, Inc., under which Laurel Hill Trucking Company would pick up merchandise at various warehouses and bring those items by truck to Ames Department warehouses throughout the United States.

6. From April, 1985, until December, 1986, Plaintiff received periodic commissions from Defendant on the Ames account.

7. On December 31, 1986, Defendant stopped paying commissions to Plaintiff.

8. The Plaintiff has duly performed all the conditions of her part to be performed under the terms of said contract.

9. For such services Defendant agreed and promised to pay Plaintiff an ongoing commission as determined by the contract.

10. The Plaintiff has made demands upon the Defendant for the monthly commissions pursuant to the contract, but in breach of the aforementioned contract the Defendant has wholly neglected to comply with the terms of the contract and has refused and still refuses to pay said commissions to the Plaintiff.

12. The Defendants [sic] refusal to pay the ongoing commission constitutes a breach of the contract whereby the Plaintiff has been damaged in an amount equal to the value of said commissions to which amount Plaintiff has become entitled as a result of work performed.

WHEREFORE, Plaintiff prays this Court award judgment against the Defendant in a sum equal to the value of said commissions according to the contract entered into by the parties, costs, and grant Plaintiff such other relief as the Court deems proper.

COUNT II

(Complaint for Accounting)

13. Plaintiff repeats and realleges all the allegations contained in Paragraphs 1 through 12 of this Complaint as if set forth in full herein.

14. Plaintiff has insufficient information and belief to enable her to allege the exact amount owed to Plaintiff in commissions.

15. The amount of commissions paid Plaintiff by Defendant from April, 1985, to December, 1986, totaled approximately $8,024.00. Upon information and belief, Plaintiff's Commissions [sic] from January, 1987, to the present would have been $50,000.00.

16. An accounting from Defendant will be necessary in order to determine the exact amount of commissions to which Plaintiff is entitled under the contract, but Plaintiff is informed and believes and therefore alleges that such accounting will disclose that Plaintiff is entitled to a greater sum than that set forth under Paragraph 15.

WHEREFORE, Plaintiff prays this Court for an accounting by Defendant to Plaintiff for the gross value of loads trucked by Laurel Hill Trucking Company on the Ames Account and for judgment against the Defendant for commissions due Plaintiff as a result of said accounting.

DATED: May 16, 1988

Vandermeulen, Goldman, Allen & O'Brian
61 Main Street, Room 62
Bangor, Maine 04401

BY: _____
Perry O'Brian
Attorney for Defendant

STATE OF MAINE
PENOBSCOT, SS.

SUPERIOR COURT
CIVIL ACTION , CV-88-212

DEIDRE CALURI

Plaintiff

vs.

NEIL RYPKEMA, d/b/a LAUREL HILL TRUCKING COMPANY

Defendant

AFFIDAVIT OF DEIDRE CALURI IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

1. My name is Deidre Caluri.

2. In February, 1985, I contacted Neil Rypkema, in New Jersey, by telephone and discussed with him the possibility of becoming the Maine representative for Laurel Hill Trucking Company. At this time, I told Mr. Rypkema that I wanted to contact various businesses in Maine to see whether they needed trucking services. If I was successful in obtaining contracts for Laurel Hill Trucking, my fee would be based on a percentage of the total hauled under the contract.

3. On March 4, 1985, I called Ames Department Store in Newport, Maine, to find out who I would talk to about shipping. They referred me to Joe Nacky who worked at their regional headquarters in Rocky Hill, Connecticut.

4. On March 8, 1985, I called Ames Department Store in Rocky Hill, Connecticut, and spoke with Joe Nacky. He referred me to George Bolduc, Assistant Traffic Manager. I asked Mr. Bolduc whether they would be interested in having Laurel Hill Trucking do their hauling. He asked me if we had trucks in Ohio, Pennsylvania and Massachusetts. I told him yes. He then asked me to send him information on rates and insurance.

5. I next drafted a letter to George Bolduc and sent it to Neil Rypkema for his approval.

6. On March 14, 1985, I made two different phone calls to Neil Rypkema at Laurel Hill Trucking to see if my letter met with his approval.

7. On April 3, 1985, my letter was sent to Mr. Bolduc in Rocky Hill, Connecticut. A copy of that letter is attached hereto as Exhibit A.

8. After this letter was sent, I made several follow-up calls to both Laurel Hill Trucking in New Jersey and Ames Department Stores in Connecticut.

9. On April 16, 1985, I received a telephone call from George Bolduc requesting a meeting at his office in Connecticut.

10. I made several telephone calls to confirm this meeting.

11. On April 23, 1985, I traveled to Rocky Hill, Connecticut and met with George Bolduc. Neil Rypkema traveled to Connecticut from his office in New Jersey.

12. On April 25, 1985, Neil Rypkema sent a letter to George Bolduc setting forth additional information on trucking services.

13. In May, 1985, I made several calls to George Bolduc in Connecticut to see whether he had reached any decision.

14. Laurel Hill Trucking subsequently began hauling for Ames Department Stores. The first load was pulled for Ames on May 28, 1985.

15. On August 20, 1985, I received a telephone call from Laurel Hill Trucking regarding the status of the Ames account. Apparently business was slow and Laurel Hill wanted me to find out why.

16. I made several telephone calls to George Bolduc in Connecticut and Laurel Hill Trucking in New Jersey to determine the status of the Ames account. Soon after these calls business increased dramatically.

17. I made other calls periodically to Laurel Hill Trucking to check on the status of the Ames account.

18. In addition to the Ames account, I contacted numerous companies in Maine to see whether they needed trucking services which Laurel Hill Trucking could provide. Neil Rypkema was made aware of these contacts. These attempts did not result in any contracts.

19. On April 29, 1985, I met with Tom Golden of Georgia Pacific in Woodland, Maine, regarding trucking services. A letter was sent by me to Neil Rypkema of Laurel Hill Trucking for his approval before being sent to Georgia Pacific. No contract for Laurel Hill Trucking resulted in these contacts.

DATED: September 1, 1988

_____

Deidre Caluri, Plaintiff

STATE OF MAINE

Penobscot, ss.

Personally appeared Deidre Caluri, and made oath that the above statements are true to the best of her knowledge and belief.

Before me,

_____

Notary Public

STATE OF MAINE
PENOBSCOT, ss:

SUPERIOR COURT
CIVIL ACTION DOCKET NO. CV-88-212

DEIDRE CALURI,

Plaintiff

vs.

NEIL RYPKEMA, d/b/a LAUREL HILL TRUCKING COMPANY.

Defendant

AFFIDAVIT OF CORNELIUS S. RYPKEMA

Cornelius Rypkema, Defendant, being first duly sworn, deposes and says as follows:

1. My name is Cornelius S. Rypkema.

2. I am the President of Laurel Hill Trucking Company of Secaucas, New Jersey.

3. I have never personally entered into a contract with Deidre Caluri.

4. I have never personally done business in the State of Maine.

5. I have never personally committed a tortious act or caused a tortious act to be done in the State of Maine.

6. I do not personally own, use or possess any real estate situated in the State of Maine.

7. I have never personally contracted to ensure any person, property or risk located within the State of Maine.

8. I have never personally contracted to supply services for things within the State of Maine.

9. My domicile and residence is the State of New Jersey.

10. I am not acting as a director, manager, trustee or other officer for the corporation incorporated under the laws of the State of Maine or having its principal place of business within the State of Maine.

DATED: July 13, 1988

_____

CORNELIUS S. RYPKEMA

STATE OF NEW JERSEY July 13, 1988

Hudson, ss

Personally appeared the above-named Cornelius S. Rypkema and made oath that the foregoing Affidavit is true to the best of his knowledge and belief.

Before me,

_____

Notary Public/Attorney at Law